BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 36025

TEXAS CENTRAL RAILROAD AND INFRASTRUCTURE, INC. &
TEXAS CENTRAL RAILROAD, LLC-
AUTHORITY TO CONSTRUCT AND OPERATE-
PASSENGER LINE BETWEEN DALLAS, TX AND HOUSTON, TX

JURISDICTIONAL REPLY TO PETITIONERS' RESPONSE TO THE BOARD'S REQUEST FOR ADDITONAL INFORMATION

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REPLY OF TEXANS AGAINST HIGH SPEED RAIL, INC. TO PETITIONERS' RESPONSE TO THE SURFACE TRANSPORTATION BOARD'S REQUEST FOR ADDITIONAL INFORMATION BASED ON THE BOARD'S LACK OF PASSENGER RAIL JURISDICTION UNDER ICCTA

Texans Against High Speed Rail, Inc. ("TAHSR") submits this Reply in opposition to the Response filed by Petitioners Texas Central Railroad and Infrastructure, Inc. ("TCRI") and Texas Central Railroad, LLC ("TCRR") (collectively "TCR) to the Surface Transportation Board's request for additional information in its Decision issued June 20, 2019. Petitioners' are not entitled to a reopening.

SUMMARY OF ARGUMENT

TCR claims that it is an interurban electric railway that is proposing to operate a "closed system" of intrastate tracks between points in Houston and Dallas, Texas. TCR's closed system "will run on dedicated HSR tracks for passenger rail service only and cannot travel on other rail lines."[1] As FRA has recently noted, TCR's closed system "will replicate the system and operations of

[1] Federal Railroad Administration ("FRA"), *Dallas to Houston High-Speed Rail Environmental Impact Statement*: *Scoping Report*, at p. 3 (April 2015).

the Tokaido Shinkansen,"[2] which is operated by the Central Japan Railway Company. That isolated system is incompatible with the general system of rail transportation in the United States and cannot interconnect with the interstate rail network that hosts Amtrak's passenger operations. As the operator of such a unique railway system, TCR is not, and will not be, a "rail carrier" as defined by 49 U.S.C. § 10102(5).[3]

Moreover, TCR's proposed multi-modal operations in interstate commerce will not be "only by railroad." Because the Board's general jurisdiction under 49 U.S.C. § 10501(a)(1)(A) applies to "transportation by rail carrier that is (A) only by railroad," the Board lacks jurisdiction to approve TCR's proposed project. Nor will TCR's "closed system" be part of the interstate rail network. Even if it were, the Board, consistent with the unambiguous wording of 49 U.S.C. § 10501(a)(2)(A) and ICCTA's legislative history, has no remaining entry, exit and fare jurisdiction over rail passenger service. Lastly, because the Board has no jurisdiction over the construction of TCR's closed system of tracks, the Board should summarily deny TCR's Petition to Reopen.[4]

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[2] Letter to Michael Finnegan from Ronald L. Batory, dated August 30, 2019, and filed with the Board on October 3, 2019. Even if FRA were to issue a rule of particular applicability (RPA) to TCR at some indeterminate time in the future, that act will have no impact whatsoever on the instant matter. It will not restore the Board's pre-ICCTA jurisdiction over passenger rail service. Nor will it cause TCR's closed system to be part of the interstate rail network.

[3] Prior to ICCTA, the provisions of § 10102(5) were codified at 49 U.S.C. § 10907 of the ICA and denied the ICC authority under sections 10901-10906 over a "street, suburban or interurban electric railway that is not operated as part of a general system of rail transportation." Nothing substantive was changed by ICCTA.

[4] Should the Board find that it has jurisdiction, TAHSR has also filed a separate pleading that focuses on the evidentiary failures of TCR's positions.

I. The Board's Prior Conclusion That TCR's Proposed Line Would Not Be Part Of The Interstate Rail Network And Is Therefore Not Within the Board's Jurisdiction Is Correct As A Matter Of Law.

The Board's July 18, 2016 Decision denying the petition collectively filed by TCRI and TCR under 49 U.S.C. § 10502 for an exemption from the prior approval requirements of 49 U.S.C. § 10901 was correctly decided. The Board does not have jurisdiction over the construction of TCR's proposed line.

As the Board noted, "[i]t is undisputed that [TRC's proposed] Line would provide only intrastate passenger service between Dallas and Houston." Slip op. at 4. It explained that what TCR "characterizes as its proposed 'connections' to Amtrak are not sufficient to make the proposed Line part of the interstate rail network." The Board also noted TCR's admission that "the Line would not directly connect, nor would it be feasible to directly connect with Amtrak." *Id.*

In seeking reopening, TCR has not, and cannot, point to any evidence it would directly connect its proposed system with the interstate rail network. As before, TCR's alleged "connections" with Amtrak would still require passengers to "connect" with Amtrak "by taking a seven-mile shuttle bus service in Houston" or by either taking a shorter shuttle service in Dallas or walking approximately a mile. These intermodal movements simply do not constitute "seamless" all rail transportation service required by section 10501(a)(1)(A).

While a through ticket may reflect an interstate movement by a passenger, a ticket alone cannot subject the movement to the Board's general jurisdiction over rail passenger transportation. While Congress intended to

expand the Board's jurisdiction over rail freight transportation when it enacted ICCTA, it unquestionably intended to eliminate and curtail the Board's pre-existing jurisdiction over rail passenger transportation.

A. TCR's project cannot satisfy the general jurisdictional provisions of 49 U.S.C. § 10501(a)(1)(a) and § 10501(a)(2)(A).

In seeking reopening, TRC wholly ignores the unequivocal statutory language of 49 U.S.C. § 10501(a)(1)(A), which states that "the Board has jurisdiction over transportation by rail carrier that is (A) ***only by railroad.***" (emphasis added). It also ignores the statutory limitation that requires the transportation to be part of the interstate rail network. 49 U.S.C. § 10501(a)(2)(A).

Even if TCR's "closed system" were to be constructed, TCR would still have to arrange for the transportation of potential passengers between its facilities and those of Amtrak by bus or some other mode of non-rail transportation. Because TCR's proposed through-ticket service, by definition, is ***not only by railroad***, the Board lacks statutory jurisdiction over TCR's proposed rail passenger transportation services.[5]

For this reason, the Board would lack jurisdiction even if TCR has entered into a valid through-ticking arrangement with Amtrak. TCR cannot

[5] Congress drew an explicit statutory distinction between the "general system of transportation" and the "interstate rail network." The "interstate rail network" over which all trains can be physically operated is a statutory component of the Board's general jurisdiction. The same is not true of unique track systems that part of the "general system of rail transportation" that, while subject to FRA's jurisdiction under the Rail Safety Acts, cannot be used for the transportation of all types of standard rail equipment.

directly connect its closed system (which uses a unique Japanese track technology) with the interstate rail network that encompasses the tracks of the host railroads over which Amtrak operates. Therefore, the Board must reject TCR's petition to reopen and affirm its prior decision of July 18, 2016, that it does not have jurisdiction over TCR's proposed line.

B. ICCTA eliminated the Board's general jurisdiction over rail passenger transportation.

ICCTA's legislative history shows that Congress intended to enhance the Board's jurisdiction over *freight rail transportation* by providing it with exclusive jurisdiction over *freight rail* transportation between "a place in a state and another place in the same state as part of the interstate rail network."[6] The same is not true with respect to the Board's jurisdiction over *passenger rail* transportation service.[7]

The relevant legislative history begins with the explanatory comments in the Report of the Committee on Transportation and Infrastructure, H.R. Rep. No. 104-311, at 82 (1995). Its "*Summary of Rail Provisions in H.R. 2539"* explicitly identifies the "[p]rovisions and activities that would be **repealed or eliminated** upon enactment of H.R. 2539 (emphasis added). *Id*. These

[6] 49 U.S.C. § 10501(a)(2)(A).

[7] As will be demonstrated, Congress eliminated the Board's rail passenger jurisdiction with the exception of two provisions involving (i) facilities for interchange and (ii) liability of rail carriers under receipts and bills of lading. Neither exception provides the Board with post-ICCTA jurisdiction over the construction of a system of intrastate tracks that cannot be physically connected with the interstate rail network.

provisions and activities include, among other items, *"[r]egulation of entry, exit, and fares of passenger rail service*" (emphasis added). *Id.* at 82.

That intent is next reflected in the proposed Interstate Commerce Commission Sunset Act of 1995.[8] As explained in the Report of the Committee on Commerce, Science, and Transportation:[9]

> Beyond weeding out outdated and unnecessary provisions, the bill generally does not attempt to substantively redesign rail regulation. Rather it would preserve the careful balance put in place by the 4R Act and the Staggers Act that led to a dramatic revitalization of the rail industry while protecting significant shipper and national interests.
>
> Outdated Regulatory Provisions. The bill would eliminate many outdated, unnecessary, and burdensome regulatory requirements and restrictions on the rail industry. These include, for example, the elimination of *all regulation of rail passenger transportation.*[10]

The description in S. Report 104-176 of the proposed amendments to the Board's "General Jurisdiction," contains the following:

> This section would amend 49 U.S.C. 10501—which establishes jurisdiction over rail and pipeline transportation and intermodal rail-water or pipeline-water transportation—in several respects. The exclusive nature of the Board's regulatory authority under Part A would be clarified (paragraph 1). The Board's rail jurisdiction would be limited to freight transportation (paragraph 2 and 4), because rail passenger transportation today (other than service by Amtrak, which is not regulated under the ICA) is now

[8] S. 1396. This Act was introduced by Chairman Pressler and Senator Exon on November 3, 1995.
[9] S. Report 104-176, 104th Cong. 1st Session, Nov. 21, 1995.
[10] *Id.* at 6 (emphasis added).

> purely local or regional in nature and should be regulated (if at all) at that level.[11]

Finally, in addressing the amendment of 49 U.S.C. 10501, the Joint Explanatory Statement of the Committee of Conference that accompanied H.R. 2539 briefly summarizes the House provision with the terse comment that "[t]his provision (Section 301) replaces the railroad portion of former Section 10501. Conforming changes are made to reflect the direction preemption of state economic regulation of railroads."[12]

Then, the entirety of the Senate version is repeated:

> Section 304 (General Jurisdiction) amends 49 U.S.C. 10501, which establishes jurisdiction over rail and pipeline transportation and intermodal rail-water or pipeline-water transportation in several respects. The exclusive nature of the Board's regulatory authority would be clarified. The Board's rail jurisdiction would be limited to freight transportation, because rail passenger transportation today (other than service by Amtrak, which is not regulated under the Interstate Commerce Act) is now purely local or regional in nature and should be regulated (if at all) at that level."[13]

The Conference substitute reads, in pertinent part, as follows:

> This provision adopted by the Committee changes the statement of agency jurisdiction ***to reflect curtailment of regulatory jurisdiction in areas such as passenger transportation***. In light of the exclusive Federal authority over auxiliary tracks and facilities, this subject is integrated into the statement of general jurisdiction. This section also clarifies that, ***although regulation of passenger transportation is generally eliminated***, public transportation authorities that meet the existing criteria for being rail

[11] *Id.* at 29.
[12] H.R. Rep. 104-88, at 167 (1995) (Conf. Rep. 104-422).
[13] *Id.*

> carriers may invoke the terminal area and reciprocal switching access remedies of section 11102 and 11103.[14]

Nothing in the foregoing legislative history is ambiguous. When Congress enacted ICCTA, it intended to enhance the Board's jurisdiction over rail freight operations that are "part of the interstate rail network." Conversely, Congress decided to curtail or eliminate the Board's general jurisdiction over passenger rail transportation.

As a result, private contractual agreements like the agreement TCR has allegedly reached with Amtrak to promote the sale of through tickets cannot restore the Board's jurisdiction over passenger rail transportation. Under that agreement, even if a traveler purchased a through ticket that results in interstate transportation involving Amtrak, TCR, bus and cab service (or walking approximately one mile), that purchase would not provide the Board with any statutory jurisdiction over the traveler's interstate transportation. That agreement cannot trump Congress' explicit intent to curtail and eliminate the Board's jurisdiction over passenger rail transportation.

C. Congress's decision to retain the pre-existing definition of "transportation" in section 10102 does not negate its intent to eliminate the ICC's former jurisdiction over rail passenger service.

Both the House and Senate precursors to ICCTA proposed the elimination of various definitions in section 10102. The House, unlike the Senate version, retained the basic wording of former subsection 10102(26),

[14] *Id.* (emphases added).

which defined the word "transportation" as including, among other items, "equipment of any kind related to the passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and services related to that movement, … interchange of passengers and property." [15] As explained in the House Report:

> The amended definitions delete several terms redundant in light of the abolition of regulatory jurisdiction over express and sleeping car companies. Unlike the former Section 10102, the definitions are confined entirely to terms to railroad provisions.[16]

As the Conference Report explains, the Conference substitute:

> integrates changes common to both House and Senate provisions *to reflect reductions in regulatory jurisdiction*. To reflect the reorganization of all rail provisions into a separate part, non-rail definitions have been deleted. To clarify that only providers of rail transportation for compensation are within the scope of the statute, the definition of "rail carrier" is limited to persons providing *common carrier* rail transportation.[17]

There is nothing in the legislative history to suggest that the House, by retaining the word "passenger" within the definition of "transportation," intended *sub silentio* to reject the repeated goal of eliminating the Board's rail passenger jurisdiction or to modify the Board's general jurisdiction. Any such suggestion is repudiated by the statement in the H. Report 104-311 regarding

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[15] The Senate version would have amended the definition of the word "transportation" in former subsection (26)(A) and (B) by (i) striking the words "of passengers or property or both" in (A) and inserting "of property" in their place and (ii) by striking the words "passengers and" in (b).*See* S. Bill 1396, section 303 and S. Report 104-176, at p. 29.
[16] H. Report 104-311, at p. 95.
[17] Conf. Report at 166 (initial emphasis added).

the retention of the Carmack Amendment as part of proposed section 11506 in H.R. 2539. As was explained:

> This section reenacts the rail portions of the statutory regime governing carrier liability for loss and damage to shipments, known as the "Carmack Amendment" from its antecedent legislation, previously recodified as section 11707. Along with the facilities access provisions discussed earlier, this is the only provision of the revised statute still made applicable to rail *passenger* transportation, as well as freight service. (Emphasis in original).[18]

The definition of "transportation" does not provide the Board with general jurisdiction over the construction of a closed system of tracks that is, by physical design and the nature of its proposed connections, not part of the interstate rail system.[19]

D. The various pre-ICCTA precedents cited by TCR are irrelevant and immaterial in the narrow context of this matter.

TCR's petition to reopen relies solely on its claim that the through ticketing arrangement that appears to have been negotiated with Amtrak has resulted in substantially changed circumstances that require reopening. As TAHSR has previously argued, "TCR's 'paper bridge' with Amtrak is merely an unenforceable 'agreement to agree; that does not constitute substantially

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[18] H. Report 104-311, at p. 109.

[19] In *DesertXpress Enterprises, LLC-Petition for Declaratory Order,* FD No. 34914, slip op. at 13, it appears that the Board did not consider the foregoing comments regarding the deliberate termination of "entry, exit, and rate regulation of passenger rail transportation" when it focused briefly on the literal wording of section 10102(9) at pp. 12 and 13. TAHSR respectfully submits that had the Board focused on the entirety of the legislative history, it would have recognized that Congress explicitly intended to eliminate its regulatory jurisdiction over far more than "passenger train discontinuance and special passenger rates." *Id.* at 13.

changed circumstances."[20] As the Board explained in its July 18, 2016 Decision, while it may examine several factors in determining its jurisdiction, "*no one factor is controlling*" (emphasis added).[21] Because the asserted through ticket arrangement is the only factor identified by TCR, the Board must deny reopening.

There is nothing in the various pre-ICCTA cases cited by TCR that supports a claim of continued Board jurisdiction when the legislative history demonstrates a deliberate intent to eliminate Board jurisdiction of "entry, exit, and fares of passenger rail service." TAHSR does not contest the pre-ICCTA proposition that interstate transportation resulted when a rail carrier that was located solely in one State was involved with an interstate movement of freight or passengers that either commenced or terminated in the State in which it was located. Nor does TAHSR quarrel with the precedents that involve other administrative agencies.

However, because this matter must be decided under the law as it now exists, and not as it existed prior to the enactment of ICCTA in December 1995, the various pre-ICCTA cases cited by TCR are inapplicable, distinguishable, and no longer on point. *See United States v. Capital Transit Co.*, 325 U.S. 357 360 (1945) ("We must now test the Commission's power in this case by the provisions of a statute enacted subsequent" to an earlier precedent that was based on the law as it existed in 1912."

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[20] TAHSR Reply in Opposition to Reopen, filed May 31, 2018, at 12.
[21] *Id.*

E. TCR's reliance on DesertXpress is misplaced.

In its Reply, TCR heavily relies on the Board's reasoning expressed in *DesertXpress Enterprises, LLC—Petition for Declaratory Order*, FD 34914 (STB served May 7, 2010). Its reliance is misplaced.[22] The Board in its decisions in *DesertXpress* did not address highly relevant portions of the legislative history, nor did it have any reason to focus on the provisions of § 10501(a)(1)(A), whose significance in this matter cannot be avoided.

In *DesertXpress 2010*, the Board primarily focused on the provisions of subsection 10501(a)(2)(A). As the Board reasoned:

> First, the phrase "as part of the interstate rail network" in subsection 10501(a)(2)(A) is ambiguous, and the legislative history of the ICC Termination Act of 1995 (ICCTA) supports the view that Congress did not intend it to restrict the Board's preexisting jurisdiction over rail transportation that crosses a state line.[23]

As it also explained:

> We do not believe that Congress intended that phrase to impose any new limitation on the agency's pre-ICCTA authority over rail transportation that crosses a state line. Instead, we conclude that the phrase was added in ICCTA as a necessary qualification to ICCTA's new, explicit statutory grant of jurisdiction to the agency over *intrastate* rail transportation."[24]

However, there is nothing in the legislative history to support the suggestion that Congress differentiated rail passenger service that crosses a

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[22] Herein after referred to as "*DesertXpress 2010.*"
[23] *Id.* at 8 (footnote omitted).
[24] *Id.* (emphasis in original).

state line from rail passenger service that does not cross a state line.[25] Instead, both the Senate and the House of Representative clearly agreed from the outset that, except for explicitly defined exceptions, the Board's jurisdiction over rail passenger service under ICCTA should be curtailed or eliminated.

While the Board's jurisdiction over rail passenger transportation was curtailed or eliminated, federal jurisdiction over Amtrak and the national rail passenger transportation was vested in other agencies. FRA, for example, "exercises jurisdiction over all railroad passenger operations, regardless of the equipment they use."

However, Congress retained the Board's limited jurisdiction under statutes other than ICCTA to regulate aspects of Amtrak's services. *See, e.g.* the Rail Passenger Service Act of 1970 ("RSPAA"), by which Congress assigned the dispute-resolution role to the Interstate Commerce Commission in matters that arise between Amtrak and the host railroads. The Board now occupies that role. *Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1229 (2015). *See* 49 U.S.C. §24308(a). [26]

The Board also cannot rely on its prior assertion in *DesertXpress* that:

> The House version of the bill amended section 10501(a)(2)(A) to add the phrase 'the same or' to give

[25] It is unquestioned that the Board has retained its pre-ICCTA jurisdiction over rail freight carriers, including the construction of lines or track used by such carriers. Moreover, Congress clearly extended the Board's jurisdiction over intrastate freight rail operations.

[26] Moreover, under Section 213(a) of the Passenger Rail Investment and Improvement Act of 2008 ("PRIIA"), the Board may investigate whether delays and service quality deficiencies are due to causes that could reasonably addressed by the host freight railroad, Amtrak or other intercity passenger rail operators. None of that authority, however, is involved here.

> the agency jurisdiction over rail transportation between a place in 'a State and a place in *the same or* another State,'* without qualification. *H.R. Rep. No. 104-311 at 3(1995) (emphasis added by Board).[27]

The Board's "without qualification" comment appears to focus on the language that was initially proposed in the House version of H.R. 2539, which did not include the phrase "as part of the interstate rail network." That, however, has nothing to do with the repeated statements in the legislative history that Congress meant to terminate the Board's passenger rail jurisdiction.

Conclusion

For all the above-stated reasons, the Board should affirm its prior conclusion that it lacks jurisdiction and deny TCR's request that it reopen this proceeding.

[27] *DesertXpress* at 9.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served all parties of record in this proceeding with this document by United States mail or by e-mail on October 8, 2019.

/s/ Richard H. Streeter